No. 14564

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & Co., a Corporation,

Appellant,

vs.

METROPOLITAN ENGRAVERS, LTD., METROPOLITAN MAT SERVICE, INC., GREGORY F. DUFFY, AUBREY A. DUFFY, ALFRED SMUTZ, WALTER C. DUFFY and FRANK R. BLADE,

Appellees.

REPLY BRIEF OF APPELLANT.

JOHN L. WHEELER and
NEWLIN, HOLLEY, TACKABURY & JOHNSON,
GEORGE W. TACKABURY,
HUDSON B. COX,
1020 Edison Building,
601 West Fifth Street,
Los Angeles 17, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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REPLY BRIEF OF APPELLANT.

I.

Introduction.

This reply of Appellant, Sears, Roebuck & Co., is in answer to the separate briefs of Appellee, Frank R. Blade and Appellees Metropolitan Engravers. Ltd., Metropolitan Mat Service, Inc. Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz and Walter C. Duffy. We believe that each can be answered in the limited space of a single Reply Brief because the issues raised by the Appellees present little or nothing that was not contained in the written opinion of the trial court [R. 65-87], which was fully answered in Appellant's Opening Brief.

II.

No Inconsistency Existed Between This Action and the State Court Action.

It seems clear that the basic point of departure between the parties to this appeal lies in the constantly reiterated assertion that Sears Roebuck had but a single primary right of recovery against both Blade, the employee, and against the engraving suppliers and that having proceeded against Blade in the State Court and secured a writ of attachment the Appellant irrevocably elected its remedy and was estopped from asserting the present action in the United States court. Neither the record nor the law supports the theory of depriving Appellant of the major portion of its remedy for the wrongs alleged to have been inflicted upon it.

The facts are not in dispute. Indeed, inasmuch as this appeal arises from judgments on the pleadings, the facts could not be in dispute. However, in view of the misinterpretation of the facts in the Briefs of Appellees, we restate them briefly. Blade, the advertising manager for the Los Angeles group of stores owned and operated by Appellant [R. 6], received over the years secret bribes or commissions from those with whom he contracted for advertising engraving. Sears Roebuck, discovering this infidelity on the part of its trusted employee in 1951, sued him in the State Court for money had and received for the use of his employer [R. 38-39], and secured an attachment in connection therewith. In pursuing this remedy it was doing no more than exercising the statutory rights afforded it by California Labor Code, Section 2860 (formerly Civ. Code, Sec. 1985):

> "§2860. *Ownership of things acquired by virtue of employment.* Everything which an employee acquires

by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

If there is any doubt that this was the nature of the right being invoked, it is set at rest by the Bill of Particulars filed in the State Court action [R. 45-47] from which it conclusively appears that the only recovery being sought in the State Court action was the secret bribes or commissions paid to Blade by the engravers.

> "The above amounts were received by said Frank R. Blade for the account of plaintiff but were not reported to plaintiff or accounted for by said Blade and plaintiff did not discover that said sums had been paid to and received by said Blade until the month of December, 1951." [Bill of Particulars—R. 46.]

There was accordingly no waiver of tort and suit *in assumpsit*. It was a simple action in implied contract by an employer against its employee for moneys received in the course of his employment which by statute belonged to the employer.

How could this action conceivably be inconsistent with the present action alleging a conspiracy between Blade and the engraving suppliers to defraud and overcharge Appellant for engraving work? It is only necessary to look at the Amended Complaint for Damages for Fraud [R. 3-28], to see that the recovery sought is the amount of overcharges made, not the sums received by the employee for the use and benefit of his employer. Thus the prayer is for damages in the sum of $162,001.45, plus interest and exemplary damages, which in turn is the sum of the overcharges made by the Metropolitan Engravers and Mat

Service, $141,975.95 [R. 10], and the overcharges by the Barnard Company* in the amount of $20,021.50 [R. 12].

Neither of the Appellees' briefs undertakes to distinguish any of the numerous and controlling authorities at pages 11 to 23 of Appellant's Opening Brief.

Restatement, Agency, Sec. 407(2);

Callinan v. Federal Cash Register Co., 3 F. R. D. 177;

Tarnowski v. Resop, 236 Minn. 33, 51 N. W. 2d 801;

Kuntz v. Tonnele, 80 N. J. Eq. 373, 84 Atl. 624;

Mayor of Salford v. Lever, 1 Q. B. 168 (1891);

Barnsdall v. O'Day, 134 Fed. 828;

Glaspie v. Keator, 56 Fed. 203;

City of Findlay v. Pertz, 66 Fed. 427.

The above cited authorities clearly hold that an action to recover secret bribes received by an agent is separate and distinct from and consistent with an action for damages against third parties conspiring with the agent to defraud the principal. Appellees do not cite any cases from California or elsewhere, contrary to the clear rule enunciated by these authorities.

Counsel for the Appellee Blade purport to distinguish the foregoing authorities of Appellant upon the ground that in none of them did it affirmatively appear that the defrauded principal undertook to join the agent in both actions, *i. e.,* the action to recover secret bribes or profits from the agent and the action against the third parties for damages for fraudulent overcharges (Footnote 4, pp. 12-

*As noted in our Opening Brief, there was no appearance by the Barnard Co. and the action is not being prosecuted as to it. (Op. Br. p. 7.)

13 of Brief for Appellee, Frank R. Blade). But if the soundness of the rule—that the two actions are separate and distinct—be conceded, the fact that in the second action the perfidious employee is joined as a defendant co-conspirator to fraudulently overcharge Appellant can hardly convert these two causes of action and two remedies into one.

As the Engraver Appellees point out in their brief, with copious citations (Br. of Metropolitan Engravers, *et al.,* p. 12t): "Each conspirator is jointly and severally liable for all the injury resulting from the conspiracy," and they cite *Revert v. Hess,* 184 Cal. 295, 303, for the proposition that it matters not whether the conspirators expected or received any benefit from the wrongful act. With Blade concededly a proper party defendant in the present action for conspiracy to defraud, his joinder cannot obliterate the accepted fact that the State Court action to recover secret profit or bribes from the employee is separate and distinct from and not inconsistent with the action for damages for the fraudulent overcharges made.

Appellees' Reliance on State Court Attachment Has Been Misplaced.

Counsel for Appellee Blade tax us with ignoring the significance of the attachment secured in the State Court action; but the attachment has no significance unless Appellant was required to elect its remedy and it would have to elect its remedy only if the one action was inconsistent with the other (See Point III of the Op. Br. pp. 31-33), which brings us back again to the point of beginning and to the only decisions in point, namely, those cited above and also cited and presented at pages 11 to 23 of the Opening Brief, which hold the rights or causes of action to be independent, separate and consistent, one with the other.

Steiner v. Rowley, 35 Cal. 2d 713, 221 P. 2d 9, which seems to hold so mesmeric an attraction for the Appellees, is not only distinguishable, it is just not in point. The case arose upon demurrers to four counts of a complaint, all against defendant Rowley, a real estate broker, brought by his principals as the purchasers of a piece of property. The first count was for the recovery of $2,000.00 as a side payment and secret profit received by Rowley in the deal. The second count, for money had and received, was for the same $2,000.00 paid Rowley by the sellers in the transaction. The third count alleged that, in addition to the $400.00 commission paid Rowley by the plaintiff purchasers, he received a secret profit of $2,000.00 out of the escrow on instructions of the sellers. In the fourth count plaintiffs alleged that because Rowley obtained the $2,000.00 by fraud, oppression and malice, they were entitled to exemplary damages. The court reversed with instructions to overrule the demurrers to the first three counts. The demurrer to the fourth count was upheld because the plaintiffs had secured an attachment and had thereby elected to proceed with the contractual remedy. In this connection, the court stated:

> "But the Steiners also obtained an attachment. This was a positive act of a plaintiff 'in pursuant of * * * (the contractual remedy) * * * whereby he had gained * * * advantage over the other party * * *.' (*De Laval Pac. Co. v. United C. & D. Co.,* 65 Cal. App. 584, 586, 224 P. 776.)" (p. 720 of 35 Cal. 2d.)

The remedies for the recovery of the same moneys from the same person, in contract on the one hand and in tort on the other, were plainly inconsistent and an election could be compelled. The case would be analogous only if the fourth count or cause of action had been against Rowley and the sellers, *not for the secret $2,000.00 commission,* but for damages for the difference between the fair market value of the property purchased and the price paid. In such a case we have no doubt the demurrer to the fourth count would have similarly been overruled, although the propriety of joining the two causes of action in a single complaint is open to doubt. (See *Callinan v. Federal Cash Register Co.* (D. C., W. D., Mo.), 3 F. R. D. 177 (referred to at pp. 12-13 of Op. Br.) A separate and distinct tort action for a different measure of recovery would have been effectively pleaded against the sellers and the broker for their combined conspiracy to defraud the plaintiffs as in the case at bar.

Again we emphasize that the only authorities in point (pp. 11-23 of the Op. Br.) clearly stand unchallenged, and we see no escape from the proposition that the Appellant had the right to exercise, as it did, its dual rights to recover from its employee his wrongful receipts and from the co-conspirators the fraudulent overcharges they made. It may be, as suggested in the Opening Brief (p. 34) but by no means conceded by the authorities, that Blade might be entitled to have credited against any judgment recovered against him the amount of any

recovery finally effected in the State Court action, but the distinct and separate nature of the remedies recognized by law stands untrammelled and unchallenged.

Estrada v. Alvarez, 38 Cal. 2d 386, 240 P. 2d 278, which relied upon *Steiner v. Rowley,* is similarly not contrary to the decisions upon which Appellant relies. This action for damages for breach of contract arising out of the purchase of a truck on a conditional sales contract was against the same defendant seller as the alternative remedy for damages for fraud; having levied an attachment on the contract cause of action the court held plaintiffs to be precluded under the *Rowley* case from proceeding with their alternative cause of action for damages for fraud. Upon their face the causes of action were in the alternative and inconsistent rather than concurrent remedies.

Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1, aids the Appellees not at all for it merely affirms the discharge of a writ of attachment in an action sounding in fraud upon the ground that the writ is issuable only in actions *ex contractu.*

Here the only real issue before the court is whether *two* actions, the State Court action against the employee to recover moneys paid to him as bribes and the present action to recover from the sellers and the employee the fraudulent overcharges made by them pursuant to the alleged conspiracy, are mutually inconsistent one with the other. The cases cited at pages 11 to 23 of the Opening Brief hold the two causes of action to be separate and distinct.

Other cases cited in the brief of Appellee do not require in our opinion any separate consideration.

III.

Laches Presents No Bar to Appellant's Suit and Appellees' Reference Thereto Is Wholly Without Merit.

It remains but to consider the tenuous and transparent plea of laches raised in Sections II, III and IV of the Brief of Metropolitan Engravers, apparently based upon an affidavit not now part of the record but which these Appellees say they will move to have made part of the record on appeal (Engraver's Br. p. 5). If we correctly understand the tenor of this argument, with its dramatic references to the "greatest war of all time," to the disappearance of nations, to the atomic bomb, to medical discoveries and to the growth of Los Angeles (Engraver's Br. pp. 21-22), we are left with the uncomfortable feeling that the Appellant's undeniable burden of proof when it is finally afforded its day in court may indeed be difficult to sustain. But surely an uphill battle of proof on the plaintiff's part is a poor excuse for a plea of laches by the defendants in an attempt to sustain a judgment denying the right to adduce that proof.

It is only necessary to quote two sentences from the flamboyant rhetoric of these portions of the Engraver's Brief to illustrate our point. Speaking of the Appellant, they say (Br. of Metropolitan Engravers, p. 21):

> "It does not know but only is informed and believes that the amount paid to these *respondents* (*sic*) was in excess of the fair market price. The amount of such excess is now unknown to plaintiff but it is informed and believes that the same is well known to defendants [R. p. 8]."

It may well be that the changing current of world affairs will make the proof difficult, perhaps impossible, but that

is scarcely a sound basis for denying Appellant the right to make the effort. We find ourselves but little persuaded by the argument that difficulty or possible inability to prove a fraud should thus summarily condone the wrongdoing and furnish a defense to the alleged defrauders.

The complaint alleges [R. 9] and it will be incumbent upon Appellant to prove the amounts paid to Metropolitan Engravers from February 5, 1942, through November 29, 1951, and that these amounts exceeded the prevailing and fair market price for engraving of like grade and quality in the Los Angeles area during the years in question. The complaint alleges further upon information and belief, that for the five years preceding February 1, 1942, namely, from about January 1, 1937, until February 5, 1942, like fraudulent overcharges were made by Metropolitan Engravers pursuant to the conspiracy with Blade [R. 10-11], but the amounts paid during those years are alleged to be unknown to Appellant although well known to Appellees. These allegations Appellant will also have the burden of proving and if through lapse of time, shifting of population or loss of records (Engraver's Br. p. 25), it is unable to sustain the burden, the loss will certainly not be that of Metropolitan Engravers but rather that of the Appellant.

On its face the plea of laches and the supposed prejudice from lapse of time to Metropolitan Engravers is demonstrably ludicrous in light of the fact that Appellant to prove its claim for these years may have to do so through the records or memory of the Appellee Engravers or their employees.

As a matter of law, however, even apart from the factual frivolity of the laches argument, the doctrine ap-

plies in a fraud case such as this only to delay and prejudice following *discovery* of the fraud.

23 Cal. Jur. 2d, "Fraud and Deceit," Sec. 61, p. 151:

> "However, under the rule in this state that the limitation of an action for relief on the ground of fraud is governed by the time of discovery, it seems that a plaintiff cannot be charged with laches in delaying the commencement of action after discovery if he sues within the period of limitation and no prejudice is shown to have resulted from his delay. In a case, therefore, where the fraud has been successfully concealed by the perpetrator, no delay in bringing suit, however long, will defeat the remedy, provided the injured party was, during all of the interval, ignorant of the concealed fraud * * *."

In *Dabney v. Philleo,* 38 Cal. 2d 60, 237 P. 2d 648, arising as the case at bar on a judgment of dismissal on the pleadings, the court said a failure for 22 years to discover the fraud was no ground for the invocation of laches (p. 66):

> "Since we cannot as a matter of law reject plaintiffs' explanation of their delay in discovering the facts, we conclude that on the face of their pleading their cause of action did not arise until October, 1949. There has been no unreasonable delay and no change in circumstances prejudicial to defendants *since plaintiffs' discovery of the facts.* Therefore, the cause of action does not appear to be barred either by limitations or by laches."

See to the same effect:

Victor Oil Co. v. Drum, 184 Cal. 226, 242, 193 Pac. 243;

Brown v. Oxtoby, 45 Cal. App. 2d 702, 707, 114 P. 2d 622.

As to any laches in the *discovery* of the fraud, the amended complaint alleges in detail the circumstances and date of discovery of the fraud [R. 13-14], and the reasons why it was not earlier discovered [R. 15], to-wit: Appellant's reliance upon the good faith of and confidence in Frank R. Blade and particularly:

> *"that the formulas and techniques for computing rates for engraving work of the nature herein involved were matters with which plaintiff had no familiarity or knowledge and concerning which plaintiff was compelled to and did rely upon the knowledge, experience, expertness, loyalty and good faith of its said Advertising Manager, the defendant, Frank R. Blade."*

There is no question but that under California law in a fraud case seeking recovery beyond the normal period of the statute of limitations it is incumbent upon the plaintiff to allege the circumstances surrounding the discovery of the fraud and why the fraud was not sooner discovered,* but this Appellant did at length in paragraph XI of its Amended Complaint [R. 13-16] and it is entitled to prove and sustain its allegations in a trial upon the facts rather than suffer a summary rejection of its allegations by a judgment on the pleadings.

> *"Since we cannot as a matter of law reject plaintiffs' explanation of their delay in discovering the facts, we conclude that on the face of their pleading their cause of action did not arise until October, 1949."*
>
> *Dabney v. Philleo, supra,* at p. 66.

**Lady Washington C. Co. v. Wood,* 113 Cal. 482, 486, 45 Pac. 809; *Davis v. Hibernia Sav. Etc. Soc.,* 21 Cal. App. 444, 448, 132 Pac. 462.

The law does not look with favor upon the plea of a person, allegedly party to a conspiracy to defraud, to urge that his fraud should have sooner been discovered.

See *Anderson v. Thacher,* 76 Cal. App. 2d 50, 172 P. 2d 533, in which the following quotation from *Victor Oil Co. v. Drum, supra,* appears at page 70:

> "The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.' "

In *Mabry v. Randolph, 7* Cal. App. 421, the court aptly said, page 426:

> "It does not lie in the mouth of appellants to complain of the want of promptness of plaintiff in discovering the fraud, and proceeding to rescind, since it was their concealment in violation of their duty to him and his interests which prevented him from knowing the actual conditions at the time of the transaction. Equity rewards the diligent, but this has no application to the diligent in concealment and deceit."

Conclusion.

In an appeal, arising as this does solely upon the pleadings, we cannot take too seriously pleas of laches and delay in view of the detailed allegations of the amended complaint [R. 13-16] which we seek only an opportunity to prove. We state that there is only one real issue presented upon this appeal and that is whether Sears, Roebuck, having sought to recover from Blade the bribes and commissions he received in the State Court action, thereby forfeited and lost forever its right to proceed against the sellers (Metropolitan Engravers *et al.*) for the allegedly fraudulent overcharges they conspired with Blade to inflict upon the Appellant. The answer is spelled out with clarity and certainty in the cases and authorities we cited in our Opening Brief (pp. 11-23).

That the trial court erred in rendering the judgments it did, there is no doubt. Had counsel of record now representing Appellant on this appeal been present in the lower court on the occasion of the application of Appellees Metropolitan Engravers, Ltd., Metropolitan Mat Service, Inc., Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz and Walter C. Duffy for a judgment of dismissal, and the application of Appellee Frank R. Blade for a summary judgment, and on such occasion had the governing authorities cited by Appellant above and in Appellant's Opening Brief been cited and called to the attention of the trial court (which took the opportunity to comment that no authority had been cited to it in support of the contention that the State Court action to recover the secret profits was a

separate and distinct remedy from the present action to recover for the fraudulent overcharges inflicted upon Appellant [R. 74]), we feel confident that the trial court would not have rendered its judgment of dismissal in favor of Appellees Metropolitan Engravers, Ltd., Metropolitan Mat Service, Inc., Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz and Walter C. Duffy, and its summary judgment in favor of Frank R. Blade, from which judgments the pending appeal has been taken.

We respectfully submit that the judgments of the trial court should be reversed.

Respectfully submitted,

John L. Wheeler,
Newlin, Holley, Tackabury & Johnston
George W. Tackabury,
Hudson B. Cox,

Attorneys for Appellant.